No. 79-710

In the Supreme Court of the United States

OCTOBER TERM, 1979

JEANNINE HONICKER, PETITIONER

v.

JOSEPH M. HENDRIE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1) is reported at 605 F. 2d 556 (table). The opinion of the district court (Pet. App. A-2 to A-12) is reported at 465 F. Supp. 414.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1979. The petition for a writ of certiorari was filed on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's dismissal of petitioner's complaint on the grounds that petitioner had failed to exhaust her administrative remedies before the Nuclear Regulatory Commission, and that final Commission decisions are in any event reviewable exclusively in the courts of appeals.

STATUTES INVOLVED

The relevant section of the Atomic Energy Act of 1954, Section 189, 42 U.S.C. 2239, is set forth at Pet. App. B-4. The relevant section of the Administrative Orders Review Act, 28 U.S.C. 2342(4), is set forth at Pet. App. B-3.

STATEMENT

On July 29, 1978, petitioner filed a petition with the Nuclear Regulatory Commission to revoke the licenses of all nuclear plants and virtually all nuclear fuel cycle facilities, arguing that activities now licensed by the Commission are "inextricably intertwined with the release of deadly poisons to the biosphere," *i.e.*, radioactive effluents, which she alleged caused cancer and other adverse health effects. Petitioner termed her 152-page request an emergency petition and called upon the Commission "to begin emergency and remedial action within 30 days." On August 30, 1978, the Commission informed petitioner that her submission would be considered a request to initiate license revocation proceedings under Commission regulations, and that appropriate action would be taken within a reasonable time (Pet. A-3, n.1; see 10 C.F.R. 2.206).

In view of the technical complexity of the issues raised by the petition and the necessity of consulting its technical staff, the Commission refused to handle the petition on an emergency basis (Pet. A-3).[1]

After reviewing the response of its technical staff to the petition, the Commission concluded that the petition in fact constituted a challenge to the adequacy of the NRC's regulations and licensing standards, and was reviewable under 10 C.F.R. 2.802. Pet. App. A-3 n.1. The petition is currently pending before the Commission (Pet. App. A-3).

Before her administrative claim could be decided, petitioner filed a complaint in the instant case in the United States District Court for the Middle District of Tennessee, which incorporated her pending administrative petition. The complaint sought, among other things, an order directing the Commission to revoke the licenses of all facilities over which the Commisson has jurisdiction. The district court denied petitioner's motion for a temporary restraining order.[2] On January 12, 1979,

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[1]On November 6, 1978, petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit of the NRC's September 7 letter denying emergency action. On December 21, the court of appeals, *sua sponte*, dismissed that petition on jurisdictional grounds, finding that the letter was not a final order for purposes of judicial review and that, even if it were, the court would have deferred to the "Commission's discretion and greater expertise on such questions of 'interim relief.'" *Honicker* v. *NRC*, 590 F. 2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979).

[2]Petitioner appealed the district court's denial of a temporary restraining order to the Sixth Circuit. Not receiving an immediate decision, she brought her request to this Court. Mr. Justice Stewart denied her request on September 14, 1978. Subsequently, the Sixth Circuit denied emergency relief on November 6, 1978. *Honicker* v. *Hendrie, et al.*, No. 78-1405.

following an evidentiary hearing on her application for a preliminary injunction, the district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. A-2 to A-9).

The district court rested its determination on several independent grounds. First the court noted that the Commission's technical expertise was necessary to determine whether the nuclear fuel cycle created the hazards alleged by petitioner[3] and that petitioner had therefore failed to exhaust her administrative remedies under the Commission's regulations. Pet. App. A-3 to A-5. Second, the court held that, even if petitioner had exhausted her remedies, review of the Commission's actions is vested exclusively in the court of appeals under 42 U.S.C. 2239 and 28 U.S.C. 2342(4). Pet App. A-5 to A-6. Third, the court found that, given the nature of the scientific controversy on the issues petitioner raised, the doctrine of primary jurisdiction was "particularly appropriate" and precluded petitioner from seeking relief initially in the courts rather than before the Commission. Pet. App. A-6 to A-7. In reaching these determinations, the district court expressly found that, contrary to petitioner's contention, the Commission had not admitted that the nuclear fuel cycle presents an imminent threat to petitioner's health. Pet. App. A-8 to A-9.

After briefing and argument, the court of appeals affirmed the district court's order of dismissal "[f]or the reasons set forth in the district court's thorough and well-reasoned memorandum opinion" (Pet. App. A-1).

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[3]At the evidentiary hearing on the preliminary injunction, petitioner admitted that there was a divergence of scientific opinion regarding the relation between radiation doses in human beings and the probability of cancer or other adverse health effects. Pet. App. A-7 n.5.

ARGUMENT

In its well reasoned opinion upon which we rely, the district court applied the established principle that, barring extraordinary circumstances not present here, parties may not seek judicial relief prior to exhausting their administrative remedies. The court also followed the rule that, when a statute calls for direct appellate review of final agency decisions, district courts do not have independent jurisdiction to review such decisions. The court of appeals affirmed these holdings, and further review by this Court is not warranted.

Under both the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), and the regulations of the NRC, 10 C.F.R. 2.200-2.206 and 10 C.F.R. 2.802, "any person" may initiate Commission proceedings to revoke the licenses of nuclear fuel cycle licensees, or to issue or modify NRC regulations. Exhaustion of these administrative remedies is a prerequisite to the filing of any judicial proceeding. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The need for exhaustion is particularly strong "where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise." *McKart* v. *United States*, 395 U.S. 185, 194 (1969); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970). Both factors are present here.

With respect to the need for special knowledge to resolve the underlying dispute, the district court stated (Pet. App. A-7; footnote omitted):

> Determination of a highly complex and controversial question of nuclear science, the effect on human health of the low level radiation exposure allegedly produced by the ordinary operation of the nuclear

> fuel cycle, would be crucial to an adjudication in this case. Certainly, expertise in the field of nuclear science would facilitate such a determination. The NRC possesses this expertise; the court does not.

Similarly, the district court concluded (Pet. App. A-8) that resolution of the dispute "implicates fundamental questions of national policy concerning the development of nuclear energy," matters which involve the exercise of considerable discretion.

This observation accords with the conclusion reached by this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978; emphasis in original):

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

The district court correctly ruled that none of the exceptions to the exhaustion doctrine is available in this case. See Pet. App. A-4 to A-5; 3 K. Davis, *Administrative Law Treatise* § 20.03, at 69 (1958). Petitioner did not challenge the constitutionality of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) or the Energy Reorganization Act of 1974 (42 U.S.C. 5841 *et seq.*), which authorize the Commission to regulate

nuclear fuel cycle activities. Nor does the case present purely legal questions; on the contrary, it requires resolution of highly complex technical issues. See Pet. App. A-7 & n.5. Finally, the court rejected petitioner's contention that irreparable harm would result if nuclear fuel cycle activities were not immediately halted. Pet. App. A-8 to A-9. Under the circumstances, exhaustion of administrative remedies is mandatory.

Even had petitioner exhausted her administrative remedies, the district court would not have had jurisdiction to entertain her case. The pertinent judicial review statutes, 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b), provide that the court of appeals has exclusive jurisdiction to review final orders of the Commission. There is no concurrent jurisdiction in the district court.[4]

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[4]Petitioner's reliance on alternative jurisdictional statutes (Pet. 16-20) is misplaced. The federal question and mandamus jurisdictional statutes, 28 U.S.C. 1331 and 28 U.S.C. 1361, are in the present case supplanted by the doctrines of primary jurisdiction and exhaustion of administrative remedies, together with the provisions for court of appeals review of agency action. Furthermore, with regard to 28 U.S.C. 1361, the total shutdown of the nuclear fuel cycle requested by petitioner cannot reasonably be characterized as a non-discretionary ministerial duty of the type to which the mandamus statute applies. The civil rights statutes (28 U.S.C. 1343 and 42 U.S.C. 1983) are inapplicable because respondents do not act under color of state law. Similarly, petitioner has not demonstrated that the actions of which she complains are in violation of non-discretionary legal duties and that resort to the administrative process would be futile. See *Concerned Citizens of Rhode Island* v. *NRC*, 430 F. Supp. 627 (D. R.I. 1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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